IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC. and
JOHN ANDERSON, Manager of the
NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

—against—

MS. CIDNI CAREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

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Interest of the Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1940.

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*/ Letters of consent to the filing of this Brief Amicus Curiae are on file with the Clerk of the Court.

It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations**/ and is supported by contributions from the public. For many years its attorneys have represented parties and has participated as amicus curiae in the federal courts in cases involving many facets of the law.

Attorneys employed by the Legal Defense Fund have represented plaintiffs in many cases arising under Title VII of the Civil Rights Act of 1964, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Albemarle Paper Co. v. Moody, 422 U.S 405 (1975). Amicus has also participated in many of the leading cases involv-

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**/ Thus, the Legal Defense Fund has had no connection with the NAACP, which supplied the counsel for respondent in this case, for more than twenty years.

ing attorneys' fees questions, both as counsel, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Bradley v. School Board of the City of Richmond, 416 U.S 696 (1974); Hutto v. Finney, 437 U.S 678 (1978); and as amicus curiae, e.g., Christiansburg Garment Co. v. Equal Employment Opportunity Comm., 434 U.S. 412 (1978). Therefore, the Fund has a direct interest in the resolution of a number of the issues raised in the present case.

SUMMARY OF ARGUMENT

I.

By its clear language, Title VII authorizes the award of counsel fees for work done in the administrative proceedings that must be exhausted as a precondition to filing an action in federal court. The statute makes no distinction between state and federal agency proceedings, and there is no basis in law or policy for making any.

II.

The Tenth Amendment is no bar to Congress' authorizing fees for work done in state administrative proceedings. The district court's reasons for denying fees herein were insufficient to overcome the presumption in favor of an award.

ARGUMENT

I.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AUTHORIZES THE AWARD OF COUNSEL FEES FOR WORK DONE DURING ADMINISTRATIVE PROCEEDINGS

Amicus urges that the language of 42 U.S.C. § 2000e-5(k) that counsel fees may be awarded to the prevailing party in "any action or proceeding under this subchapter" (emphasis added), compels the conclusion that fees may be awarded for work done during administrative proceedings as well as judicial actions. When § 2000e-5(k) was originally adopted in the 1964 Civil Rights Act, the § 2000e-5 enforcement scheme relied upon both administrative and judicial proceedings. As this Court noted in Alexander v. Gardner-Denver, 415 U.S. 36, 47 (1974):

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., Congress indicated that it considered the policy against discrimination to be the 'highest priority' . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U.S.C. § 2000e-5(b) (1970 ed, Supp. II) (EEOC); 42 U.S.C. § 2000e-5(c) (1970 ed, Supp. II) (state and local agencies); 42 U.S.C. § 2000e-5(f) (1970 ed, Supp. II) (federal courts).

In contrast, the contemporaneous attorney's fees provision in § 204(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), is limited in scope to "any action commenced pursuant to this subchapter." (Emphasis added.) While Title VII's enforcement scheme is both administrative and judicial, Title II's enforcement scheme is strictly court action, see Newman v. Piggie Park Enterprises, 390 U.S 400 (1968). Thus, the specific use of the broadly inclusive phrase "action or proceeding" in § 2000e-5(k) indicates a deliberate decision by Congress to make administrative proceedings subject to attorney's fees and costs awards. Similarly, use of the terms "under this title" ("under this subchapter" in the United States Code) rather than narrower terms limiting applicability to the judicial action provisions indicate that § 2000e-5(k) was intended to apply to the administrative and judicial proceedings in § 2000e-5 enumerated by this Court in Alexander v. Gardner-Denver Co., supra.

Other sections of Title VII, together with their legislative history, make it clear throughout the statute that the word "proceeding" includes administrative, both State and federal,

as well as judicial proceedings. Thus, § 704, 42 U.S.C. § 2000e-3(a), proscribes as "an unlawful employment practice" discrimination by an employer, employment agency or labor organization against an employee, inter alia, "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title" (emphasis added). Statutory language, legislative history, agency construction and case law, all indicate that "proceeding," like the preceding term "investigation" and following term "hearing," refers to EEOC proceedings.[1/]

Congress settled the meaning of "proceeding" in 1972 when § 2000e-3(a) was amended, as the Conference section-by-section analysis described it, "to make clear that joint labor-management apprenticeship committees are covered by those provisions which relate to . . . retaliation against individuals participating in Commission

1/ Rutherford v. American Bank of Commerce, 11 EPD ¶ 10,829 at p. 7488-7489 (D.N.M. 1976), see also, EEOC v. Salvation Army, 3 EPD ¶ 8090 (N.D. Ga. 1970); Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972), affirming, 317 F. Supp. 1217 (D.N.M. 1970).

proceedings" (emphasis added).[2/] Similarly, § 716(b), 42 U.S.C. § 2000e-12(b), provides that "[i]n any action or proceeding based on any alleged unlawful employment practice," no person shall be subject to liability or punishment under certain good faith defenses that "[s]uch a defense, if established, shall be a bar to the action or proceeding," notwithstanding certain judical modifications or rescissions (emphasis added). Nothing precludes § 716(b)'s application to EEOC or state deferral agency proceedings.

Sections 706(b), (d) and (e), 42 U.S.C. § 2000e-5(b), (d) and (e), in the 1964 version of the Act and § 706(b), (c) and (e), and § 709(d), 42 U.S.C. § 2000e-5(b), (c), (e) and 8(d), as amended in 1972, specifically refer to state or local deferral proceedings as, inter alia, "proceedings," "state or local proceedings," or "procedure[s]." There simply is no question that such proceedings include administrative proceedings.[3/]

2/ Subcom. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972) at 1849.

3/ See, e.g., Love v. Pullman Co., 404 U.S 522 (1972).

Finally, in the United States Code the term "proceeding" commonly includes administrative proceedings. See, e.g., the Administrative Procedure Act, 5 U.S.C. § 551, et seq.[4/] Indeed, Congress recently amended 5 U.S.C § 6322 concerning leave for federal employees for jury or witness service in a "judicial proceeding," but went so far as to make clear that "[f]or the purpose of this subsection, 'judicial proceeding' means any action, suit, or other judicial proceeding, including any condemnation, preliminary, informational, or other proceeding of a judicial nature, but does not include an administrative proceeding" (emphasis added).[5/]

4/ The APA is cited in Title VII at § 716(a), 42 U.S.C. § 2000e-12(a).

5/ See also 5 U.S.C. § 8125; 18 U.S.C. § 205; 33 U.S.C §§ 923(b), 924, 927 and 928 (provisions in which the term "proceedings" refers to administrative proceedings). Indeed, 18 U.S.C § 205's use of "proceedings", which regulates conflicts of interest by federal officers or employees, has been specifically construed to apply to "an administrative grievance proceeding, such as the EEO complaint procedure," Memorandum To Heads Of Departments And Agencies From Attorney General Edward H. Levi, dated November 20, 1975. 33 U.S.C. § 927 is an unmistakable provision for fees for legal representation before the Employees' Compensation Board of the Department of Labor, compare, Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177, 1195-1197 (D. Minn. 1974) (OEO regulations at 45 C.F.R. § 1067.2-5 provide for attorney's fees).

If Congress wanted to limit awards of fees to "proceedings before a court," it well knew how to do so. See, e.g., 42 U.S.C. § 406(b).

Were there doubt about the scope of "proceedings," "Title VII . . . is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination," Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

In cases involving federal employees, the lower courts have correctly applied the principles set out above and have held that the term "proceeding" includes the administrative proceedings that must be exhausted as a condition to filing an action in federal Court. Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977); Fischer v. Adams, 572 F.2d 406 (1st Cir.

6/ cont'd.

1978). Therefore, counsel fees may be awarded for work done during the administrative processing of federal EEO complaints both by the courts and by the agencies responsible for enforcement of Title VII rights. Smith v. Califano, 446 F. Supp. 530 (D.D. C. 1978).

Congress ratified this interpretation of § 2000e-5(k) when it passed the Civil Service Reform Act of 1978, in 5 U.S.C § 7701(g)(2). That section specifically provides that in administrative appeals where Title VII or other discrimination claims are raised and the complainant prevails thereon, counsel fees are to be awarded pursuant to Title VII standards. The Senate report on the bill notes that

> ....statutory law already provides for the award of attorney fees whenever a party in a discrimination suit prevails. The section preserves the right of the Board to award attorney fees ... whenever it finds the employee's rights under the laws prohibiting discrimination have been violated. Sen. Report No. 95-969 (95th Cong. 2d Sess.) p. 61. (Emphasis added). 6/

6/ As originally introduced, both the Senate and House versions of the Civil Service Reform Act of 1978 only provided for counsel fees under a restrictive standard in limited instances where a federal employee won an appeal from, e.g., an agency adverse action. See, 5 U.S.C. § 7701 (g)(1). At hearings it was pointed out that the statute could be interpreted as overruling the

Petitioners in the present case concede the correctness of the above decisions holding that counsel fees may be awarded for administrative proceedings in Federal Title VII cases (Brief for Petitioners at p. 6). There is, however, no basis for distinguishing cases involving private or state and local governmental employer cases, or proceedings before state administrative agencies or the Equal Employment Opportunity Commission.7/ Nothing in the language or the legislative history of § 2000e-5(k) suggests any intent to make such a differentiation between the various administrative proceedings that must be exhausted as a precondition to filing a Title VII action in federal court. Indeed, to the extent

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6/ cont'd.

holding in Smith v. Califano, supra, that agencies could award fees in discrimination administrative proceedings. Thus, § 7701(g)(2) was added to make it clear that the Smith ruling would be preserved.

7/ Under the President's Reorganization Plan No. 1 of 1978, jurisdiction over federal employee EEO complaints was transferrred to the EEOC. Thus, all employees covered by Title VII now must go to the same federal agency to exhaust administrative remedies.

the statute speaks, it mandates that the United States be liable for costs, including attorneys' fees, "the same" as any other party. See, Christiansburg Garment Co. v. EEOC, 434 U.S. 417, 422, n.20 (1978).

Moreover, the policy considerations are the same whether the employer is a federal, state, or local governmental agency or a private company. Congress clearly intended to encourage, in all cases, the administrative resolution and conciliation of complaints. See, Alexander v. Gardner Denver Co., 415 U.S 36 (1974). Full resort to the administrative process would be discouraged, however, if counsel fees could be obtained only for work done in court or in the EEOC. Obviously, counsel can have an important role in state administrative processes, both in attempting to negotiate settlements and in representing clients at hearings. If such efforts cannot be compensated through an award of fees, an attorney would have little choice but to advise a client to short-cut state processes. Complainants would therefore resort to the already unnecessarily over-burdened EEOC and federal courts, a result that would undermine Congress' purpose in requiring that complainants go to state or local agencies in the first place.

II.

THERE ARE NO VALID REASONS NOT TO AWARD FEES FOR STATE ADMINISTRATIVE PROCEEDINGS

Amicus urges that none of the reasons advanced by petitioners in their Brief as to why counsel fees may not be awarded for work done in state or local agency proceedings have any substance. Petitioners first argue that in some way the Tenth Amendment is a bar to Congress' authorizing the payment of counsel fees by private defendants to compensate for work done in a state administrative agency. This Court, however, has already held that Congress has the authority under Section 5 of the Fourteenth Amendment to override the Eleventh Amendment and give the federal courts the power to award counsel fees against a state itself. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 229 (1969). Moreover, it has also held that a state court may be required to entertain a federal cause of action to vindicate the civil rights established by 42 U.S.C. §§ 1981 and 1982. Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). Thus, there can be no question of Congress' power under the Fourteenth Amendment to permit the much less in-

trusive remedy of fees paid by private parties in state proceedings.

In the second part of their Brief petitioners discuss issues which, Amicus urges, are not fairly encompased by the questions presented in their petition for a writ of certiorari.[8/] In particular, the question of whether attorneys' fees could have been denied simply because counsel were employed by a public interest law organization was not decided by either of the courts below, nor raised in the petition for a writ of certiorari.[9/] With regard to the general proposi-

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8/ Conversely, the Brief does not discuss all of the questions that are raised by the petition. In particular, it does not discuss at all the third question, whether the respondent was the prevailing party within the meaning of the Act. We would urge that she clearly was since she obtained, administratively, full relief on the merits of her discrimination claim after she had filed her action in federal court. That she no longer had to pursue her claims in court in no way changes the fact that she prevailed on her federal Title VII claim. See, Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

9/ On the merits of the issue, it is clear that the employment status of counsel is irrelevant to whether fees should be awarded. Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978); Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976); Rodriquez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977); Tillman v.

tion regarding the reviewability of the district court's exercise of its discretion in refusing to award fees, it has been clear ever since Newman v. Piggie Park Enterprises, 390 U.S 400 (1968), that such discretion must be guided by proper legal standards. Thus, fees must ordinarily be

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9/ cont'd.

Wheaton-Haven Recreation Association, 517 F.2d 1411 (4th Cir. 1975); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974); Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Brandenburgh v. Thompson, 494 F.2d 885 (9th Cir. 1974). Congress endorsed these decisions when it passed the Civil Rights Attorney's Fee Act of 1976. The House report stated:

> Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization.

H. Rep. No. 94-1558 (94th Cong. 2d Sess.), p. 8, n.16, citing Torres v. Sachs, supra, Fairley v. Patterson, supra and Incarcerated Men of Allen County v. Fair, supra. Petitioners are simply wrong in their assertion that awards of counsel fees are unnecessary to encourage such organizations to take cases. To the contrary, a growing and substantial portion of the income of public interest law organizations, including that of amicus, comes from counsel fee awards. If fees were not available, the litigation programs of such groups would have to be sharply curtailed.

awarded except under exceptional circumstances, none of which are present here. See, Hutto v. Finney, supra.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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